Filed 9/26/01

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JOSEPH W. LEVY et al.,

Plaintiffs and Respondents,

v.

GERALD H. BLUM, as Trustee, etc.,

Defendant and Appellant;

GIBSON, DUNN & CRUTCHER LLP,

Objector and Appellant.

F035332

(Super. Ct. No. 609030-2)

OPINION

APPEAL from an order of the Superior Court of Fresno County. John E. Fitch, Judge.

Gibson, Dunn & Crutcher LLP, David Cathcart, Wayne W. Smith, David A. Battaglia and Robert S. Warren for Defendant, Objector and Appellants.

Baker, Manock & Jensen, Kendall L. Manock, Jeffrey A. Jaech and Kathleen A. Meehan for Plaintiffs and Respondents.

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts C. and D. of DISCUSSION.

This appeal challenges a trial court's $25,992 sanctions award under Code of Civil Procedure section 128.5[1] against Gerald H. Blum (Blum) and his attorney, Gibson, Dunn & Crutcher LLP (Gibson) (collectively appellants), in favor of Joseph W. Levy (Levy), and Bret Levy, Felicia Weston, and Jody Schlesinger (the Levy children) (collectively respondents).

After granting respondents' motion to enforce a settlement agreement that the parties had reached after a full day of negotiations, and in which an attorney from Gibson had explicitly entered into the record before the trial court nearly nine months earlier, the trial court found that appellants' action of taking a position in "total disregard of the clear, unambiguous terms of the in-court settlement agreement" was frivolous and in bad faith. Appellants seek reversal contending the trial court erred in finding (1) section 128.5, not section 128.7, was the applicable sanctions statute, (2) their actions were frivolous, and (3) the attorney fees and expenses sought were incurred as a result of their sanctionable conduct. Appellants further contend the trial court erred in awarding sanctions against Gibson personally, as well as against Blum, without prior notice.

We will find the court awarded sanctions under the appropriate statute, it did not abuse its discretion in finding that appellants' actions were frivolous, and that the amount awarded was incurred as a result of their sanctionable conduct. While we affirm the trial court's finding that Blum was given notice that sanctions were being sought against him, we will reverse the trial court's order awarding sanctions against Gibson because it was not given advance notice that sanctions were being sought against it personally.

FACTUAL AND PROCEDURAL HISTORIES

Following Gertrude H. Klein's death on December 24, 1973, a testamentary trust was created pursuant to Klein's written will (the Klein trust). On January 2, 1974, the petition to admit Klein's will to probate was filed, and the will, creating the Klein trust, was

[1] All further statutory references are to the Code of Civil Procedure unless otherwise noted.

admitted to probate on January 17, 1974. Pursuant to the will's terms, Klein designated Blum as the trustee of the trust, which contained 600 shares of E. Gottschalk & Co., Inc. stock. On February 6, 1979, a decree of final distribution of Klein's estate was filed, incorporating all of the terms of the Klein trust, including the appointment of Blum as trustee. Net income from the Klein trust was to be distributed equally between Levy and Blum. At the time of Blum's death, the trust's assets would be distributed equally, with one-half going to Levy or his offspring, and the other half to Blum's offspring.

On April 23, 1998, Levy filed his first of multiple petitions seeking to have the Klein trust divided into two separate trusts. Subsequently, Levy filed amended petitions on May 15, 1998, and June 25, 1998. The Levy children joined in the amended petition filed on June 25, 1998. Following Blum's objections to the June 25, 1998, petition, the trial court granted Levy leave to file a further amended petition. As a result, Levy filed a fourth petition on August 12, 1998.

By this petition, Levy sought to divide the Klein trust to accommodate the different investment objectives of the trust's beneficiaries, and to commence an action for breach of trust against Blum. By that time, the Klein trust had grown through an exchange of the 600 shares of E. Gottschalk & Co., Inc.'s stock for shares of the newly formed Gottschalks Inc., at a ratio of 1,100 to 1, and a later stock split, to nearly one million shares of Gottschalks stock. The trust also consisted of tax-free municipal bonds purchased after the sale of some of the stock. Levy sought to enjoin Blum from committing a breach of trust by selling the Gottschalks stock held in the Klein trust. Alternatively, Levy sought to remove Blum as trustee. Blum and the Blum children, Ryan Blum and Derek Blum, objected to Levy's proposed division of the Klein trust, claiming that Levy's proposal would result in an unequal and non-pro rata division of the trust.

On March 23, 1999, which was the first day of trial on Levy's petition, a settlement conference was held. That same day, respondents entered into a settlement agreement with Blum, individually and as sole trustee of the Klein trust, and the Blum children. Blum's

attorney, David Battaglia of Gibson, placed the settlement agreement's terms on the record before the trial court.

Paragraph seven of the settlement agreement provides:

> "[MR. BATTAGLIA:] Paragraph seven: The Klein Trust shall be divided into two trusts.
>
> "MR. BLUM: Say equal.
>
> "MR. BATTAGLIA: The Klein Trust shall be divided into two trusts. Mr. Blum shall remain trustee of the trust which benefits him and his issue, parens, the, quote, Blum Trust, close quote, close parens. Mr. Levy shall be the trustee of the trust which benefits him and his issue, parens, the, quote, Levy Trust, close quote, close parens. The division shall be equal."

The parties further agreed in paragraph ten that both trusts were to be administered and distributed in accordance with the terms and conditions as set forth in the decree of final distribution as to the Klein trust, except the Levy trust would benefit the Levy family and the Blum trust would benefit the Blum family.

At the date of settlement, as recited in paragraph eight of the settlement agreement, the Klein trust consisted primarily of three assets: 975,100 shares of Gottschalks common stock; municipal bonds valued at approximately $1,719,515; and a money market account with an approximate cash value of $28,062.[2] With respect to these three assets, paragraph nine of the settlement agreement provides:

> "MR. BATTAGLIA: … The Blum Trust shall consist of, parens, one, close parens, all bonds and the money market account currently held by the Klein Trust, parens, assuming an estimated value of 1,747,577 dollars, close

[2]The trust also consisted of an interest-bearing account of approximately $30,000, which was not subject to the division of assets set forth in the settlement agreement. Instead, as part of the settlement of certain claims of the Klein trust and the Blum children, the Blum children were to receive one-half of the cash in the interest-bearing account which was attributable to Levy, i.e., $15,000, and the income Levy had received, and would continue to receive until division of the Klein trust's assets, from the Klein trust, which had been held in a separate savings account and totaled approximately $71,000, provided the total amount paid to the Blum children under this provision did not exceed $125,000.

parens, minus all of the unpaid attorneys' fees pursuant to paragraph three, semicolon, parens, two, close parens, 382,550 shares of Gottschalks stock, parens, assuming that the total shares held by the Klein Trust is 975,100, close parens, semicolon, and, parens, three, close parens, one-half of all other assets held by the trust other than the bonds, money market account, and Gottschalks stock.

"The Levy Trust shall consist of, parens, one, close parens, 592,550 shares of Gottschalks stock, parens, assuming that the amount of the total shares held by the Klein Trust is 975,100, close parens, and, parens, two, close parens, one-half of any other assets held by the trust other than the bonds, money market account, and Gottschalks stock.

"To the extent that more or less than 200,000 dollars of additional attorneys' fees are unpaid currently, then the benefit or expense of the difference shall be split equally between the Blum Trust and the Levy Trust.

"Blum shall receive all income from the Blum Trust, and Levy shall receive all income from the Levy Trust as a result of this equal division."[3]

The settlement agreement did not specify a certain date for division of the Klein trust's assets, but did contain conditions that needed to be satisfied before the division could occur. One such condition required Levy to obtain a private letter ruling from the Internal Revenue Service (IRS) assuring all parties that the division would not cause any of the trusts to lose their generation-skipping tax exempt status. Pursuant to the agreement, the trial court retained jurisdiction to enforce the settlement agreement until it was fully executed.

After the settlement agreement was recorded, Levy's attorneys, believing that the IRS would require Blum, as sole trustee of the Klein trust, be an applicant for the ruling request, submitted their draft of the ruling request to Blum for his comment and signature. Blum, however, suggested that the ruling request be modified to show that the number of

[3]Apparently, before the settlement, Blum had indicated his pessimism about the future of the Gottschalks share price and his lack of interest in retaining the stock as a Klein trust investment because it did not pay dividends. Accordingly, the Levy trust was allocated more stock, while the Blum trust was allocated Levy's share of the municipal bonds and money market account.

Gottschalks shares going to the Blum and Levy trusts would be adjusted as of the date of physical division, based on the shares' market price on that date plus a $0.37 per share premium in favor of the Blum trust. Blum and his attorney contended the parties intended that the assets be equally divided, therefore the allocation of the Klein trust's assets should be determined at the time of division, not at the time the settlement agreement was entered into. Levy, on the other hand, contended that the division of assets was to be made as of the date the settlement agreement was entered into—March 23, 1999—based on an agreed share price of $7.37 per share, regardless of later changes in value.

With respect to the ruling request Levy was required to submit to the IRS, Blum took the position that although the parties disagreed about when the valuation of the Klein trust's assets was to take place for the purpose of dividing those assets, the parties could submit a ruling request to the IRS which set forth each parties' interpretation of the settlement agreement and the respective values of the assets of the Blum and Levy trusts at the time of settlement and at the time of actual division.

On September 2, 1999, respondents filed a motion to enforce the terms of the settlement agreement and requested sanctions pursuant to section 128.5. The basis for the motion was Blum's refusal to execute the rulings request to the IRS adopting Levy's interpretation of the settlement agreement. Respondents claimed when the settlement agreement was entered into, the parties set the price of the Gottschalks stock for purposes of dividing the Klein trust's assets at $7.37 per share, which was $0.37 above the stock's market price on the New York Stock Exchange at the time. Respondents claimed the parties agreed that $7.37 was a fair price for purposes of the division because, among other reasons, the stock had been trading at between $6.25 and $9 per share during the time the parties were involved in litigation. Respondents requested sanctions pursuant to section 128.5 on the ground that "Mr. Blum's refusal to comply with the confidential recorded settlement is, at best, frivolous."

Blum opposed the motion. Blum contended that the settlement agreement provided that allocation of assets between the Levy and Blum trusts was to be adjusted in the future based upon the price fluctuation of the Klein trust's main asset, 975,100 shares of Gottschalks common stock. Blum accused Levy of ignoring the "commitment to equality he made at the time of the settlement" and attempting to claim a disproportionate amount for himself, since the value of Gottschalks stock had recently increased. Addressing Levy's complaints that Blum was delaying matters by not signing Levy's rulings request, on September 14, 1999, Blum submitted his own rulings request setting out both interpretations of the settlement agreement and giving the IRS the ability to approve either or both of them.[4] Blum asked the court to charge the Klein trust's legal fees and expenses incurred in opposing the motion against the Levys' interest in the Klein trust, on the ground that Levy brought the motion in an attempt to use the court to obtain a greater share of the Klein trust's property, citing, among other authorities, section 128.5.

In their reply brief, respondents again requested sanctions against Blum on the ground that "Blum's conduct as trustee in repudiating the Recorded Settlement is insupportable." Respondents requested Blum, at a minimum, be sanctioned by ordering that no legal fees be paid from the Klein trust in connection with Blum's opposition to respondents' motion, including fees incurred for demanding a change in the settlement terms, submitting his own ruling request to the IRS, and renewing the proposal to sell all

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[4]Respondents note that the IRS expressly prohibits, and will not rule upon, a request that contains alternative scenarios. (Int.Rev. Proc. 99-1, 1999-1 I.R.B. 6, § 7.02 ["A letter ruling or a determination letter will not be issued on alternative plans of proposed transactions or on hypothetical situations"]; see also Int.Rev. Proc. 2000-1, 2000-1 I.R.B. 4, § 7.02; Int.Rev. Proc. 2001-1, 2001-1 I.R.B. 1, § 7.02.) Respondents' counsel informed Blum's counsel of this fact before Blum submitted the request for a ruling. Respondents claim Blum's request was submitted without notice to them, and that the IRS refused to rule on Blum's ruling request because of his presentation of alternatives. Blum contends that he submitted a redraft of the IRS request for ruling, along with a redlined copy, to respondents' counsel for Levy's review and comments on September 1, 1999, before submitting it to the IRS.

Gottschalks stock in the Klein trust. Respondents also requested that the court order Blum to personally reimburse them for the legal fees incurred in connection with enforcing the settlement agreement.

On December 9, 1999, a hearing was held on respondents' motion. The parties stipulated to the trial court that the motion would be heard pursuant to section 664.6, which governs entry of judgment pursuant to terms of a stipulation for settlement, as well as section 1060, which provides for declaratory relief. David A. Battaglia of Gibson was present on Blum's behalf, as was his local counsel, Janet L. Wright of Betts & Wright. The counsel for the Blum children was also present, who made clear that the Blum children were joining in Blum's opposition to the motion on the basis that the division was supposed to be equal.

After hearing argument, the trial court read its decision from the bench. The trial court stated:

> "This Court finds that it's wholly incredible and without any merit whatsoever that, number one, it was the intent of the parties, Mr. Blum or his attorneys, that the Klein Trust was to be divided pursuant to market values of Gottschalks stock existing at the time of the division; number two, also holding wholly incredible that the Blum attorneys had a right, on behalf of their client, to write a request for ruling to the IRS in which they presented a scenario for division based upon the value of the Gottschalks stock at the time of division.
>
> "I find, also, that pursuant to Section 128.5 of the Code of Civil Procedure the following actions of Mr. Blum and his attorneys were taken in bad faith, that is, without subjective good faith or honest belief in the propriety or reasonableness of such actions: Number one, contending the Klein Trust assets are to be divided according to a future market value of Gottschalks stock at the time of division; number two, requesting the IRS ruling by letter of September 14th, '99, in which a proposal is submitted contrary to the express terms of the settlement agreement; number three, defending the propriety of these actions in this motion.
>
> "Each of these actions was taken in total disregard of the clear, unambiguous terms of the in-court settlement agreement of March 23rd, 1999, terms, which I will add, were painstakingly stated by Mr. Blum's own

attorneys, in open court, reading from a written document. Each of these actions is sufficient in itself to invoke the penalties of Section 128.5.

"The Court finds that pursuant to Section 128.5 that these bad faith actions by Mr. Blum and his attorneys described above are each frivolous, that is, completely devoid of merit. They caused Mr. Levy and his attorneys to incur reasonable expenses and attorney's fees in the amount of 25,992 dollars for attorney's fees from August 1st through November 30th, plus such expenses and additional attorney's fees on this matter as Mr. Levy's attorneys shall submit on duly noticed motion."

The trial court ordered that the settlement agreement be carried into effect without regard to the value of the Gottschalks stock at the time of division, that Blum's attorneys immediately withdraw Blum's request for rulings submitted to the IRS, and that Levy submit a request for rulings to the IRS. With respect to sanctions pursuant to section 128.5, the trial court held Blum and the firm of Gibson, Dunn & Crutcher LLP, jointly and severally liable to respondents' attorney, the law firm of Baker, Manock & Jensen, for the fees and costs respondents incurred in bringing the motion, and ordered them to pay the sum of $25,992 to Baker, Manock & Jensen within 30 days. The court also stated that Baker, Manock & Jensen could bring a duly noticed motion for additional payment of fees and costs. The court further ordered that the Klein trust's assets not be used to pay Baker, Manock & Jensen's fees and costs, and that Levy's interest in the Klein trust not be used to pay fees and costs Blum incurred for legal services on all matters pertaining to the request for rulings dated September 14, 1999, and the defense of respondents' motion.

The trial court ordered respondents' counsel to prepare an order and submit it to Blum's counsel for approval as to form and content. Although the parties requested sanctions against each other in their papers, at no time prior to the trial court's ruling was the issue of sanctions discussed at the hearing by any party.

On December 17, 1999, Levy submitted a proposed order to Blum. On December 20, 1999, Blum and Gibson filed objections to the portion of the proposed order imposing sanctions. On December 29, 1999, Levy filed a brief in opposition to these

objections. On January 5, 2000, Blum and his counsel filed a response in support of their objections to sanctions.

On January 18, 2000, the trial court issued a written opinion overruling the objections of Blum and his counsel to the sanctions order and signed an order imposing sanctions against Blum and his counsel, jointly and severally, totaling $25,992. The court's order reflected the basis for sanctions given orally at the hearing. This timely appeal solely from the order imposing sanctions followed.

DISCUSSION

A. Sections 128.5 and 128.7

There are two principal statutes which provide for the imposition of sanctions against an attorney and/or a party for improperly opposing a motion or petition: sections 128.5 and 128.7.

A trial court may impose sanctions pursuant to section 128.5 against a party, the party's attorney, or both, for "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay," when the actions or tactics "arise from a complaint filed, or a proceeding initiated," prior to January 1, 1995. (§ 128.5, subds. (a), (b)(1); *Malovec v. Hamrell* (1999) 70 Cal.App.4th 434, 437-438.) A bad faith action or tactic is considered "frivolous" if it is "totally and completely without merit" or instituted "for the sole purpose of harassing an opposing party." (§ 128.5, subd. (b)(2).) Whether an action is frivolous is governed by an objective standard: any reasonable attorney would agree it is totally and completely without merit. (*Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 12; *In re Marriage of Reese & Guy* (1999) 73 Cal.App.4th 1214, 1220-1221.) There must also be a showing of an improper purpose, i.e., subjective bad faith on the part of the attorney or party to be sanctioned. (*Campbell v. Cal-Gard Surety Services, Inc.* (1998) 62 Cal.App.4th 563, 574; *In re Marriage of Reese & Guy*, *supra*, at p. 1221.) Section 128.5 requires notice and an opportunity to be heard before the imposition of sanctions, and the

court must issue a written order reciting in detail the conduct justifying sanctions. (*Trans-Action Commercial Investors, Ltd. v. Firmaterr, Inc.* (1997) 60 Cal.App.4th 352, 367.)

When the Legislature enacted section 128.5, its intent was "'to broaden the powers of trial courts to manage their calendars and provide for the expeditious processing of civil actions by authorizing monetary sanctions now not presently authorized ….'" (*Trans-Action Commercial Investors, Ltd. v. Firmaterr, Inc., supra,* 60 Cal.App.4th at p. 367.) Section 128.5 authorizes the award of attorney fees as a sanction to control improper resort to the judicial process. (*Childs v. PaineWebber Incorporated* (1994) 29 Cal.App.4th 982, 994-995.) The statute permits the award of attorney fees, not simply as appropriate compensation to the prevailing party, but as a means of controlling burdensome and unnecessary legal tactics. (*Ibid.*) Section 128.5 requires much more than a party acting with "no good reason" to justify an award of sanctions. There must be a showing not only of a meritless or frivolous action or tactic, but also of bad faith. (*Pacific Trends Lamp & Lighting Products, Inc. v. J. White, Inc.* (1998) 65 Cal.App.4th 1131, 1136.)

A concern was raised that the subjective sanction procedures of section 128.5 were ineffective. Therefore, the Legislature revised the procedures for sanctions by enacting section 128.7 in "an effort to largely bring California sanctions practice into line with rule 11 of the Federal Rules of Civil Procedure (28 U.S.C.)" (*Goodstone v. Southwest Airlines Co.* (1998) 63 Cal.App.4th 406, 419; *Trans-Action Commercial Investors, Ltd. v. Firmaterr, Inc., supra,* 60 Cal.App.4th at p. 368; *Malovec v. Hamrell, supra,* 70 Cal.App.4th at pp. 437-438.) Since the language of rule 11 of the Federal Rules of Civil Procedure is virtually identical to that of section 128.7, federal case law construing revised rule 11 is persuasive authority with regard to the meaning of section 128.7 (*Cromwell v. Cummings* (1998) 65 Cal.App.4th Supp. 10, 14, fn. 6; *Malovec v. Hamrell, supra,* at p. 440.)

Section 128.7 was an experimental statute when adopted in 1994. It was originally slated to be automatically repealed on January 1, 1999, but the repeal date was extended to

January 1, 2003. (*In re Marriage of Reese & Guy*, *supra*, 73 Cal.App.4th at p. 1220; Stats. 1998, ch. 121, § 2.) Therefore, section 128.7 is effective for "complaints or petitions filed" from January 1, 1995, to January 1, 2003. (§ 128.7, subds. (i) & (j); *Malovec v. Hamrell*, *supra*, 70 Cal.App.4th at p. 438.)

Under section 128.7, an attorney or unrepresented party who files a pleading, motion, or similar paper must sign the document, which impliedly certifies the pleading has legal and factual merit. (§ 128.7, subd. (a).) The signature reflects the certification of the attorney or unrepresented party that the pleading is not being presented for an improper purpose; the legal contentions are warranted by law or nonfrivolous argument for extension, modification or reversal of existing law; the allegations and factual contentions have evidentiary support or are likely to have such support after a reasonable opportunity to further investigate; and the denials of factual contentions are warranted by the evidence. (§ 128.7, subd. (b); *In re Marriage of Reese & Guy*, *supra*, 73 Cal.App.4th at p. 1220; *Barnes v. Department of Corrections* (1999) 74 Cal.App.4th 126, 130.) The attorney or unrepresented party is subject to sanctions for violation of this certification. (*In re Marriage of Reese & Guy*, *supra*, at p. 1220.)

Section 128.7 provides two procedures which may lead to the imposition of sanctions if the certification standards are violated: a party may move for sanctions, or the court may initiate sanctions on its own motion. (§ 128.7, subd. (c).) Once the statutory notice and hearing requirements are discharged, the court may impose appropriate sanctions which are sufficient to deter future misconduct. Such sanctions may consist of nonmonetary directives, penalties payable to the court, and, on a party's motion, monetary sanctions payable to the moving party "of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation." (§ 128.7, subd. (d); *Malovec v. Hamrell*, *supra*, 70 Cal.App.4th at p. 443.)

Section 128.7 contains a safe harbor provision specifying the motion for sanctions may not be filed "unless, within 30 days after service of the motion, … the challenged

paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." (§ 128.7, subd. (c)(1).) The party seeking sanctions must follow a two-step procedure. First, the party must serve a notice of motion for sanctions on the offending party at least 30 days before filing the motion with the court, which specifically describes the sanctionable conduct. (*Ibid.*) Service of the motion on the offending party begins a 30-day safe harbor period during which the sanctions motion may not be filed with the court. (*Ibid.*) If the pleading is withdrawn, the motion for sanctions may not be filed with the court. (*Malovec v. Hamrell, supra,* 70 Cal.App.4th at p. 440.) If the pleading is not withdrawn, the motion for sanctions may then be filed. (*Ibid.*)

The trial court must follow a similar two-step procedure if it seeks to impose sanctions against a party on its own motion pursuant to section 128.7. (*Malovec v. Hamrell*, *supra*, 70 Cal.App.4th at p. 440.) The trial court may issue an order to show cause as to why sanctions should not be imposed and set the matter for a hearing at least 30 days after service of the order. The offending party may withdraw the improper pleading during this 30-day period. If the improper pleading is withdrawn, sanctions may not be imposed. If the pleading is not withdrawn, the offending party responds to the order to show cause, the court holds a hearing, and sanctions may be imposed. (*Ibid.*)

The Legislature crafted sections 128.5 and 128.7 to "strike a balance between competing interests: the need to control improper litigation 'tactics' and the desire to avoid chilling vigorous advocacy." (*Pacific Trends Lamp & Lighting Products, Inc. v. J. White, Inc.*, *supra*, 65 Cal.App.4th at p. 1136.) There are differences, however, between the type of sanctions authorized by these statutes. First, under section 128.7, only an attorney or unrepresented party may be sanctioned; sanctions against a represented party are not authorized. Under section 128.5, the court may impose sanctions against the party, the attorney or both. (*In re Marriage of Reese & Guy*, *supra*, 73 Cal.App.4th at p. 1221.) Second, section 128.7 imposes a lower threshold for sanctions against an attorney and only requires the attorney's conduct be objectively unreasonable. Sanctions imposed under

section 128.7 are not designed to be punitive in nature, but rather to promote compliance with statutory standards of conduct. (*Cromwell v. Cummings*, *supra*, 65 Cal.App.4th at p. Supp. 14; *Malovec v. Hamrell*, *supra*, 70 Cal.App.4th at p. 441.) In contrast, section 128.5 requires a showing of subjective bad faith. (*In re Marriage of Reese & Guy*, *supra*, at p. 1221; *Llamas v. Diaz* (1990) 218 Cal.App.3d 1043, 1047.)

With these principles in mind, we turn to the sanctions imposed against appellants pursuant to section 128.5.

B. Applicability of Section 128.5

Appellants contend the sanctions award was improper because it was based on the wrong statute—section 128.5. Specifically, appellants contend that because Levy's initial petition was filed after December 31, 1994, sanctions had to be sought and imposed pursuant to section 128.7, not section 128.5. Appellants conclude that since respondents did not seek sanctions pursuant to section 128.7, and section 128.7's safe harbor provisions were not followed, i.e., appellants were not served with a noticed motion for sanctions and given 30 days to withdraw Blum's opposition to respondents' motion, the sanctions award must be reversed.

Appellants are correct that because of the differences between the two statutes, notice under one statute does not suffice for notice under the other. (See *In re Marriage of Reese & Guy*, *supra*, 73 Cal.App.4th at p. 1221 [sanctions improperly awarded under section 128.5 when sanctions specifically sought under section 128.7].) Moreover, a court has no authority to award sanctions that are sought under one statute when the other statute is applicable. (See *Murphy v. Yale Materials Handling Corp.* (1997) 54 Cal.App.4th 619, 623-624 [court erred in awarding sanctions sought under section 128.7 when section 128.5 was the applicable statute].) Accordingly, since sanctions in the present case were sought and awarded pursuant only to section 128.5, we may uphold the sanctions award only if section 128.5, rather than section 128.7, is the applicable statute here.

Contrary to appellants' assertion, the facts that Levy's initial filing with respect to his dispute with Blum regarding the Klein trust occurred after December 31, 1994, and that the filing was labeled a "petition" are not determinative of whether section 128.7 or section 128.5 applies. While it is true that section 128.7 states that it applies to "a complaint or petition filed on or after January 1, 1995," this language must be interpreted in light of section 128.5, which states that it applies to "actions or tactics [which] arise from a complaint filed, or a proceeding initiated, on or before December 31, 1994." (§§ 128.7, subd. (i), 128.5, subd. (b)(1); *Murphy v. Yale Materials Handling Corp.*, *supra*, 54 Cal.App.4th at pp. 623-624.)

In *Murphy*, the court addressed the issue of whether the trial court had authority to award sanctions against the plaintiffs under section 128.7, when sanctions were based on the plaintiffs' filing in March 1995 of a motion to file an amended or supplemental complaint, but the original complaint was filed in August 1991. In concluding that section 128.5, not section 128.7, applied, the court reasoned:

> "While the language of section 128.7 applying the section 'to a complaint or petition filed on or after January 1, 1995' might permit concluding an amended or supplemental complaint 'presented' to the court after January 1, 1995, would be subject to its requirements, such a reading of the statute cannot be squared with the explicit language that section 128.5 controls actions or tactics which 'arise from a complaint filed … before December 31, 1994.' Our interpretation of a statute must be mindful both of the words used and of the legislative scheme of which it is a part. (*Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 575 ….)" (*Murphy v. Yale Materials Handling Corp.*, *supra*, 54 Cal.App.4th at pp. 623-624.)

The interpretation of sections 128.5 and 128.7 by the court in *Murphy* applies with equal force here. While section 128.7's language applying the section "to a … petition filed on or after January 1, 1995" might permit concluding any paper labeled a "petition" filed with the court after January 1, 1995, would be subject to its requirements, this reading of section 128.7 cannot be squared with section 128.5's explicit language that it controls

actions or tactics which "arise from … a proceeding initiated, on or before December 31, 1994."

Thus, the issue presented here is not whether this particular proceeding was initiated by a petition, but whether appellants' "actions or tactics," which the trial court found to be in bad faith, "arise from … a proceeding initiated, on or before December 31, 1994." (§ 128.5, subd. (b)(1).) The only proceeding with respect to the Klein trust initiated before December 31, 1994, was the admission to probate of Klein's will in 1974, which created the Klein trust. In 1979, an order of final distribution incorporating the terms of the Klein will was filed. Therefore, section 128.5 will apply if appellants' actions found to be in bad faith, i.e., "1) contending the Klein Trust assets are to be divided according to a future market value of Gottschalks stock at the time of division; 2) requesting the IRS ruling by letter of September 14th, 1999, in which a proposal is submitted contrary to the express terms of the settlement agreement; and 3) defending the propriety of these actions in opposing" respondents' motion, arise from the administration of the Klein trust.

While there are no published cases addressing this issue with respect to probate proceedings, two cases involving petitions for dissolution are instructive: *In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, and *In re Marriage of Reese & Guy*, *supra*, 73 Cal.App.4th 1214.

In *Drake*, an interlocutory judgment of divorce was filed in 1960, with a final decree of divorce entered in 1961. In 1971, the couple's son was diagnosed with schizophrenia, and in 1983 he began living with his mother, who then created a trust to provide for him after her death. In 1988, the son, through his mother as conservator, entered into a stipulated judgment with his father in a civil case, in which the father agreed to pay a certain amount in child support. In April 1995, the mother filed an application for an order to show cause for modification of child support in their divorce case. The trial court ultimately increased the father's child support obligation, and granted a security order requiring him to pledge securities for the son's benefit, and placing a lien on the father's property. The

father filed a motion for reconsideration, which the trial court denied. (*In re Marriage of Drake*, *supra*, 53 Cal.App.4th at pp. 1148-1150.) The court also imposed sanctions pursuant to section 128.5. (53 Cal.App.4th at pp. 1168-1169.)

The Court of Appeal found that the trial court did not abuse its discretion in awarding sanctions for the father's filing of the motion for reconsideration. In addressing the father's argument that section 128.5 did not apply to the mother's petition filed in April 1995, the court explained:

> "James contends that the sanctions award was improper because section 128.5 is applicable only to 'actions or tactics [that] arise from a complaint filed, or a proceeding initiated, on or before December 31, 1994' (Code Civ. Proc., § 128.5, subd. (b)(1)), and Miriam's petition was filed in April 1995. However, because the underlying divorce action here was filed in 1960 or earlier, the sanctions award was not barred by the section 128.5 time limit." (*In re Marriage of Drake*, *supra*, 53 Cal.App.4th at p. 1169.)

In *In re Marriage of Reese & Guy*, a father filed an order to show cause to modify a 1993 child custody order in 1996, which had been entered after a 1988 petition for dissolution of marriage. After the father took the order to show cause off calendar, the mother filed a motion for monetary sanctions pursuant to section 128.5 against the father and his attorney, who countered by seeking sanctions pursuant to section 128.7 against the mother and her attorney. The trial court, while concluding that section 128.7 was inapplicable because the dissolution petition was filed in 1988, nevertheless awarded sanctions against the mother and her attorney pursuant to section 128.5. (*In re Marriage of Reese & Guy*, *supra*, 73 Cal.App.4th at pp. 1217-1219.) The Court of Appeal, in holding that a trial court may not impose sanctions under section 128.5 when the motion for sanctions has been noticed under section 128.7, noted that the trial court "correctly concluded sanctions could not be imposed under section 128.7 because that section is only applicable to actions filed on or after January 1, 1995. (§ 128.7, subd. (i).) This proceeding began in 1988." (*In re Marriage of Reese & Guy*, *supra*, at p. 1220.)

Both *Drake* and *Reese & Guy* support the conclusion that the correct statute for imposition of sanctions in this case is section 128.5, not 128.7. Both cases involved

proceedings arising from petitions for dissolution of marriage that had been filed well before January 1, 1995. In both cases, the trial court had continuing jurisdiction to determine the child support and custody issues raised after January 1, 1995. (See, e.g., *In re Marriage of Lusby* (1998) 64 Cal.App.4th 459, 469 [stating general rule that once jurisdiction is acquired in a proceeding where child support is in issue, superior court jurisdiction over child support continues]; Fam. Code, § 3422 [except in certain circumstances, a court that has made a child custody determination has exclusive, continuing jurisdiction over the determination].)

Like the court's continuing jurisdiction in the cases of *Drake* and *Reese & Guy*, the court in this case had continuing jurisdiction over the administration of the Klein trust since its admission to probate in 1974. Probate Code section 17300, subdivision (a) provides: "This article applies only to the following: [¶] (a) A trust created by a will executed before July 1, 1977, and not incorporated by reference in a will on or after July 1, 1977." Probate Code section 17301 (in the same article as Probate Code section 17300) provides in pertinent part as follows: "If a trust described in [Probate Code] Section 17300 continues after the distribution of the decedent's estate, the court in which the decedent's estate was administered retains jurisdiction over the trust for any of the purposes specified in Section 17200." Probate Code section 17200, subdivision (a) provides that a trust's trustee or beneficiary may petition the court concerning the internal affairs of the trust, and subdivision (b) sets forth a list of matters which are considered proceedings concerning the internal affairs of a trust. As stated in the Law Revision Commission Comment to this section, the list of grounds "under subdivision (b) is not exclusive and is not intended to preclude a petition for any other purpose that can be characterized as an internal affair of the trust." (Cal. Law Revision Com. com., 54A West's Ann. Prob. Code (1991 ed.) foll. § 17200, p. 194.)

The legislative purpose of Probate Code section 17300 is stated in the Law Revision Commission Comment as follows: "The effect of this section is to limit the application of

provisions for continuing jurisdiction of the court to two classes of trusts: (1) trusts created by a will executed before July 1, 1977, when trusts were no longer required to be subject to continuing jurisdiction [citing prior § 1120 of the Prob. Code], and not incorporated by reference thereafter, and (2) trusts that are specifically made subject to the continuing jurisdiction of the court by a provision in the trust instrument." (Cal. Law Revision Com. com., 54A West's Ann. Prob. Code, *supra*, foll. § 17300, p. 209.)

Here, the underlying petition, which created the Klein trust as a testamentary trust, was filed in Fresno Superior Court in 1974. There is no evidence that the Klein trust, executed on January 25, 1973, was incorporated by reference in a later will. The Fresno Superior Court thus retained continuing jurisdiction over the internal affairs of the Klein trust. The instant case involves the internal affairs of the Klein trust, as it concerns removing a trustee and dividing a trust. (Prob. Code, § 17200, subd. (b)(10), (14).) Accordingly, like a petition for modification of child support which involves the original divorce action, the sanctions award pertaining to the Klein trust's internal affairs involves the original probate proceeding, and therefore, is not barred by the section 128.5 time limit.

Moreover, the actions the trial court found to be in bad faith, namely, taking the position that the property division specified in the settlement agreement did not apply, seeking the IRS ruling, and opposing respondents' motion to enforce the settlement agreement, arose not only from respondents' petition to divide the trust, but also ultimately from the ongoing administration of the Klein trust. Respondents' petition to divide the trust necessarily arises from the probate proceeding involving the administration of Klein's estate, and the creation and administration of the Klein trust because as respondents point out, a request to divide a trust necessarily "arises from" the creation and administration of the trust, just as a petition for modification of a child support order necessarily "arises from" the initial divorce proceeding.

Appellants' attempt to distinguish *Drake* fails. Appellants claim *Drake* is inapplicable because it involved contested proceedings between the same parties. As

respondents point out, section 128.5 applies to actions or tactics arising from "proceedings initiated" prior to 1995, not "contested proceedings initiated" prior to 1995. Moreover, petitions for dissolution may proceed as an uncontested matter, and it is not clear from either *Drake* or *Reese & Guy* that the petitions for dissolution involved contested proceedings. (See Cal. Rules of Court, rule 1241 [listing circumstances in which case will be treated as uncontested matter].) Thus, whether the proceeding was "contested" does not necessarily determine whether section 128.5 applies. Similarly, section 128.5 does not require that the "proceeding" involve the same parties. For example, section 128.5 would certainly apply to "actions or tactics" by a defendant who was brought into the case to replace a Doe defendant in 1995, but where the case was initially filed prior to 1995.

Finally, appellants contend that section 128.7 applies here because the Probate Code labels actions regarding the internal affairs of a trust as "proceedings" that are commenced by the filing of a petition. (See Prob. Code, §§ 17200 ["a trustee or beneficiary of a trust may petition the court under this chapter concerning the internal affairs of the trust," and "*proceedings* concerning the internal affairs of a trust include …" (italics added)], 17201 ["A *proceeding* under this chapter is commenced by filing a petition" (italics added)]; see also Prob. Code, § 16420, subd. (a) ["If a trustee commits a breach of trust, … a beneficiary … may commence a *proceeding*" (italics added)].) Appellants reason that because Levy's petition involved the internal affairs of the Klein trust, it was a "proceeding" pursuant to the Probate Code, therefore it must also be a "proceeding" under section 128.5. Appellants conclude that since the petition was filed after December 31, 1994, and it is a "proceeding," section 128.5 cannot apply.

This contention, however, ignores the "arise from" language contained in section 128.5. In determining the applicability of section 128.5, the issue is whether the bad faith actions and tactics "*arise from* … a proceeding initiated" before December 31, 1994, not just whether a particular filing is termed a "proceeding." In this case, the actions found to have been undertaken in bad faith ultimately arose from the Klein trust established by the

final decree of distribution entered in 1979. This is shown by appellants' contention in opposing respondents' motion to enforce the settlement agreement that respondents' interpretation of the settlement agreement would violate the terms of the Klein trust, which Blum claimed provided for equality in the allocation of the trust's assets.

For these reasons, the trial court was correct in finding the sanctions award pertaining to the Klein trust's internal affairs was governed by section 128.5, not section 128.7.

C. The Award of Sanctions[*]

Appellants contend that the trial court erred in finding that their actions were frivolous and in bad faith. Appellants essentially restate the arguments they raised below to support Blum's contention that the settlement agreement provided for allocation of the Gottschalks stock based upon its fair market value at the time of division and argue that Blum had a reasonable basis for believing this. In making these arguments, however, appellants ignore the standard of review on appeal from a sanctions award—abuse of discretion.

The trial court has broad discretion to impose monetary sanctions under section 128.5, and the court's order will be disturbed only for clear abuse. (*Tenderloin Housing Clinic, Inc. v. Sparks* (1992) 8 Cal.App.4th 299, 304; *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 654.) The reviewing court does not independently determine whether the appellant's conduct was frivolous or in bad faith, and we may not substitute our judgment for the judgment of the court below. (*Tenderloin Housing Clinic, Inc. v. Sparks*, *supra*, at p. 304.) To be entitled to relief on appeal from the result of an alleged abuse of discretion, it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice. (*Sabek, Inc. v. Engelhard Corp.* (1998) 65 Cal.App.4th 992, 1001.)

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[*]See footnote, *ante*, page 1.

In their opening brief, appellants, while recognizing that "a determination concerning whether sanctions are appropriate for 'frivolous' conduct generally is subject to an abuse of discretion standard," encourage us to essentially abandon this standard and independently interpret the written instruments in this case, namely the settlement agreement, the Klein trust, and the Klein will, in light of applicable law, citing *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866, *Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 452-453, and *Newman v. Wells Fargo Bank* (1996) 14 Cal.4th 126, 134; at oral argument, appellants cited to *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826 and *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287 as well. None of these cases, however, involves sanctions under section 128.5, or discuss the appropriate standard of review of an award of sanctions under section 128.5. We, therefore, decline appellants' invitation to depart from the well settled standard of review of sanctions awards.[5]

We note that, after respondents pointed out the correct standard of review, appellants backpedal in their reply brief and concede that the standard of review is an abuse of discretion. Appellants claim, however, that Blum "vigorously maintained that the trial court abused its discretion in awarding sanctions here because its arguments and authorities did not come close to the high bar required before sanctions may be imposed—'totally and completely without merit,' an objective test." Appellants contend that the issue is whether "Blum's arguments were so inappropriate and outside the bounds of the law that sanctions were warranted."

Appellants continue to misstate the standard of review.

> "As the court stated in *580 Folsom Associates v. Prometheus Development Co.* (1990) 223 Cal.App.3d 1, 19-20 … : 'Under the appropriate standard of

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[5]We further note that the case appellants cite for the proposition that the application of law to undisputed facts is subject to the appellate court's independent review is not citable pursuant to California Rules of Court, rules 29.4(c), 976, 977, and 979. (See *Walker v. 20th Century Ins. Co.*, review granted, Sept. 24, 1997, S063473, and review dism. and cause remanded, Aug. 25, 1999, S063473, B104166.)

> review of an order awarding sanctions under section 128.5, it is not the province of this court "to consider the record on appeal to determine if appellant's conduct meets the standards of frivolousness.… [¶] … Where the issue on appeal is whether the trial court abused its discretion, the showing necessary to reverse the trial court is insufficient if it presents facts which merely afford an opportunity for a different opinion: '*An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge*….' [Citation]" [Citation.]'" (*Tenderloin Housing Clinic, Inc. v. Sparks*, *supra*, 8 Cal.App.4th at p. 304, italics in original.)

Thus, "where a trial court concludes a party's motion has been brought in bad faith and is frivolous, and sufficient evidence supports that conclusion, the imposition of sanctions will be upheld on appeal." (*Monex International, Ltd. v. Peinado* (1990) 224 Cal.App.3d 1619, 1624-1625; see also *Estate of Ivey* (1994) 22 Cal.App.4th 873, 882 [substantial evidence supported trial court's sanctions order under § 128.5].) This applies with equal force to a party's opposition to a motion.

We find that sufficient evidence supports the trial court's conclusion that appellants' actions of (1) contending the Klein trust assets were to be divided according to the future market value of the Gottschalks stock at the time of division, (2) requesting an IRS ruling containing a proposal contrary to the settlement agreement's express terms, and (3) defending the propriety of these action in opposing respondents' motion were frivolous, i.e., completely devoid of merit. (§ 128.5, subd. (b)(2).)

The trial court considered the following facts in ruling on the motion for sanctions: (1) according to Gibson, the value of the Gottschalks stock had increased significantly since the March 23, 1999, settlement, which resulted in Blum suffering a $400,000 disadvantage if the stock were allocated as stated in the settlement agreement and provided a motive for Blum making the "meritless assertion" that the Gottschalks stock was to be divided based on the fair market value at the time of division; (2) Blum's attorney, who meticulously read the agreement into the record, including every open and close parentheses of every term of the agreement, could easily have set forth language in the settlement agreement that assets allocated to each trust would be equal as determined by the

market value of Gottschalks shares at the time of division, but did not; (3) the language concerning equality, such as "the division shall be equal," placed in context with the provisions which immediately follow and construed in light of the entire settlement agreement, means that the equality of division was something the attorneys intended to achieve on March 23, 1999; (4) after the "the division shall be equal" language in paragraph seven, paragraph nine of the agreement provides for a division of all Klein trust assets, including a precise numerical allocation of Gottschalks shares to the Blum and Levy trusts, without a hint that a different numerical division would be set forth in the future or that the market value at the time of division would be a factor; (5) in paragraph nine of the agreement, after the allocation of Klein trust assets between the Levy and Blum trusts, the concluding language is that Blum and Levy shall receive income from their respective trusts "as a result of this equal division," which is in the present, not the future, tense; (6) the equality of division was achieved only after "a day of arduous negotiation concerning the fluctuating price of Gottschalks shares and agreement of a bonus to Mr. Blum of about 37 cents a share," which fact the trial court took judicial notice of; (7) the settlement was not a hurried one, where the parties might have forgotten to state material terms, and the settlement agreement was reduced to writing; (8) when Blum's attorney read the settlement agreement into the record, the reading was interrupted at times with questions and conferences between the attorneys and their clients, and included a lengthy off-the-record discussion concerning the basis of the Gottschalks stock—as the trial court characterized it "[a] more precise and carefully worded oral recitation would be hard to imagine"; (9) the court approved the settlement after receiving express assurances that the parties understood and agreed with it—nothing in the agreement was said about future market value of the Gottschalks stock; and (10) the parties were aware that the actual division of the trust assets would take place in the future based on the agreement's language, e.g., "'upon division of the trust,' respondents shall be barred from asserting the no-contest clause," "Levy shall obtain a private letter ruling from the IRS before the division occurs," "'upon division,' the

parties shall release each other from all claims," and "'until the division' the Court shall retain jurisdiction over the litigation and settlement agreement," yet the agreement stated nothing about valuing the Gottschalks shares at the time of the future division.

With respect to the request for ruling Blum submitted to the IRS, the trial court found that it was inappropriate to do so because it violated the terms of the settlement agreement, which required Levy to submit the request for ruling. The only reason the trial court could find to explain Blum's actions was Blum's desire "to present the IRS with an alternative scenario pursuant to Mr. Blum's hoped-for division based upon market values at the time of … the division of the Klein Trust." We further note that Blum has never addressed the contention that the IRS will not issue a letter ruling on alternative plans or hypotheticals, which is clearly stated in IRS procedures governing letter rulings. (See Int.Rev. Proc. 99-1, 1999-1 I.R.B. 6, § 7.02; Int.Rev. Proc. 2001-1, 2001-1 I.R.B. 1, § 7.02.) There also is no evidence to contradict respondents' contention that an IRS agent told them the IRS would not rule on Blum's request because the two alternatives were presented.

In ruling on respondents' request for sanctions the trial court found "that it's wholly incredible and without any merit whatsoever" that (1) the parties intended that the Klein trust be divided pursuant to market values of Gottschalks stock existing at the time of division, and (2) that Blum's attorney had a right, on Blum's behalf, to submit a request for ruling to the IRS in which a scenario for division was presented based upon the value of the Gottschalks stock at the time of division. The court further found that these actions, as well as the act of defending the propriety of these actions in the instant motion, were "taken in total disregard of the clear, unambiguous terms of the in-court settlement agreement of March 23rd, 1999, terms, which … were painstakingly stated by Mr. Blum's own attorneys, in open court, reading from a written document …," and that pursuant to section 128.5 these "bad faith actions … are each frivolous, that is, completely devoid of merit."

We believe the trial court's decision is completely reasonable. The trial court presided over both the settlement negotiations and placement of the settlement agreement on the record, as well respondents' motion to enforce that agreement. The settlement agreement clearly states the precise allocation of Gottschalks stock between the Blum and Levy trusts. When the stock price increased, Blum crafted legal arguments to support his assertion that the allocation was to be determined upon division, although the settlement agreement contains no language to that effect. Blum continues this on appeal, by claiming that the allocation in paragraph nine just "illustrated what a division would look like if it were to occur on the settlement date." There is nothing, however, in the settlement agreement that states the division is merely an "illustration." Instead, it states that the Blum trust "shall" consist of certain assets, and the Levy trust "shall" consist of other assets. For Blum to take the position that the allocation was to be determined at a future date flies in the face of the plain language of the settlement agreement. Moreover, submitting the request for revenue rulings with alternative scenarios is contrary to the terms of the settlement agreement and in contravention of IRS policy. Therefore, the trial court could properly find appellants' position that the allocation of stock was to take place upon division, submission of a request for ruling to the IRS presenting this scenario, and opposing respondents' motion on that basis were each "totally and completely without merit."

Appellants attempt to paint Blum as a trustee hopelessly caught between two sets of beneficiaries who disagreed regarding the interpretation of the settlement agreement, claiming that Blum was not a beneficiary under the trust and did not directly benefit from the proposed division. Blum, however, is far from a disinterested trustee, since he is an income beneficiary under both the Klein trust and the soon to be created Blum trust. Moreover, it is his children who will benefit from the assets that are ultimately placed into the Blum trust. This attempt to show Blum as a disinterested party is belied by an August 5, 1999, letter from his counsel prior to the filing of respondents' motion which states that

"the position of Mr. Blum and his counsel is set forth" in a previous letter, and that "the terms and spirit of the settlement agreement provided that Mr. Levy would be compensating Mr. Blum and his children in connection with the division, not vice versa." Obviously, Blum had an interest in the outcome of the settlement.

Appellants, in their reply brief, rely on *Campbell v. Cal-Gard Surety Services, Inc.*, *supra*, 62 Cal.App.4th at pages 574-575 for the proposition that sanctions are not warranted when an attorney has a reasonable and honest belief in the viability of each theory asserted in a complaint and evidence supporting each theory. In *Campbell*, the court found that the trial court abused its discretion in awarding sanctions under section 128.5 against the plaintiffs' attorneys for suing an insurance company for negligence when the evidence showed only that the attorneys were mistaken as to the viability of the negligence cause of action, not that they acted in bad faith. (*Campbell v. Cal-Gard Surety Services, Inc.*, *supra*, at p. 574.)

Here, in contrast, there was sufficient evidence to support the trial court's conclusion that appellants acted in bad faith in contending that the allocation of the Gottschalks stock was to occur at the time of division of the Klein trust's assets and the submission of the request for ruling to the IRS. The trial court specifically found that Blum's motive in asserting that the allocation was to occur in the future was "[s]eller's remorse in a rising market," i.e., that the stock's value had increased significantly since the settlement agreement was recorded. The trial court also relied on the fact that while Blum's attorney placed the settlement agreement on the record, the agreement contains no mention of a future allocation of Gottschalks stock based on its market value at the time of division, although the parties were fully aware that the division was to take place in the future. With respect to the rulings request, the trial court stated that the only apparent reason for disregarding "the clear terms of the settlement" was Blum's desire to present the IRS with an alternative scenario pursuant to his hoped-for division.

For all these reasons, we find the trial court did not abuse its discretion in awarding sanctions pursuant to section 128.5.

D. Notice and Due Process Concerns*

1. Amount of Sanctions Award

Appellants contend that there was no showing that the attorney fees and expenses respondents sought were incurred "as a result of" their sanctionable conduct, as required by section 128.5, subdivision (a). Specifically, appellants contend that respondents sought fees and expenses incurred from August 1, 1999, although Blum's opposition to respondents' motion to enforce the settlement agreement was not filed until October 1999, and therefore they conclude that the fees and expenses were not incurred "as a result of" appellants' sanctionable conduct. Appellants further contend that some of the fees requested "appear to relate in part" to Levy's obligations to "contact and communicate with the IRS and prepare a Request for Rulings in this respect."

Appellants ignore, however, that the conduct the trial court found to be in bad faith consisted not only of opposing respondents' motion, but also taking the position *prior* to filing Blum's opposition that the settlement agreement provided that the Klein trust's assets were to be divided according to a future market value of Gottschalks stock at the time of division. This conduct occurred well before Blum's opposition was filed in October 1999, and certainly by August 1999. Moreover, the contacts with the IRS recounted in respondents' counsel's declaration filed with respondents' reply brief clearly resulted from the conduct the trial court found sanctionable, i.e., Blum's submission of a request for ruling to the IRS which contained a proposal contrary to the settlement agreement's express terms.

The amount of a sanctions award lies within the sound discretion of the trial court. (*Dwyer v. Crocker National Bank* (1987) 194 Cal.App.3d 1418, 1438.) The court's

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*See footnote, *ante*, page 1.

discretion in the matter of sanctions is broad and will not be disturbed on appeal absent clear showing of abuse. (*Monex International, Ltd. v. Peinado, supra*, 224 Cal.App.3d at p. 1627.) In discussing the appropriateness of sanctions under section 128.5, the court in *On v. Cow Hollow Properties* (1990) 222 Cal.App.3d 1568, 1577, observed:

> "[S]ection 128.5 authorizes the award of attorneys' fees as a sanction to control improper resort to the judicial process. The statute permits the award of attorneys' fees, not simply as appropriate compensation to the prevailing party, but as a means of controlling burdensome and unnecessary legal tactics.… [¶] Consistent with this legislative purpose, the trial court is not required to make a 'strict accounting' of expenses in imposing the sanctions.… [¶] The pertinent language of section 128.5, subdivision (a) authorizes the award of attorney's fees 'incurred by another party *as a result of* bad-faith actions ….' (Italics supplied.) Construing this language broadly in light of the legislative purpose of the statute, we conclude that it requires no more than a causal relationship between the offending legal action and the expenses incurred by the opposing party."

For the reasons stated above, we find there is the required "causal relationship" between appellants' conduct the trial court found to be in bad faith, and the costs and fees awarded respondents as a result of appellants' conduct. Accordingly, the trial court did not abuse its discretion in awarding the full amount of costs and fees respondents requested.

2. Sanctions Against Gibson

Appellants further contend that the trial court erred in awarding sanctions against Blum's attorney, Gibson, Dunn & Crutcher LLP, because it did not receive advance notice that respondents were seeking sanctions against it personally. Appellants raised this issue in their written objections to the sanctions award announced orally at the December 1999 hearing. The trial court, in its written ruling, rejected appellants' contention, stating:

> "Even though Levy sought sanctions against generic 'Blum' party, it was abundantly clear from the pleadings that it was the conduct of the Blum attorneys, specifically attorney Battaglia, that was the target of Levy's criticism. In this regard, Levy presented numerous items of correspondence between the attorneys which, Levy argued, demonstrated the bad faith and allegedly dishonest conduct of the Blum attorneys. Clearly the Blum attorneys were very aware they were under attack, for their responsive

> pleadings sought to justify their actions in great detail. There was no lack of proper notice in this regard."

Sanctions awarded pursuant to section 128.5 may not be imposed against an attorney, however, unless the party seeking sanctions gives prior notice that expressly states sanctions are being sought against the attorney personally. In *Corralejo v. Quiroga* (1984) 152 Cal.App.3d 871, 874, the court reversed the trial court's award of sanctions under section 128.5 against the plaintiffs' counsel where "[t]he notice [did] not clearly provide that sanctions were being sought against the attorney." The court reasoned that "[t]he attorney must be put on notice of the need to prove his or her own blamelessness in the complained of actions." (*Corralejo v. Quiroga, supra,* at p. 874.)

Similarly, in *Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, the court reversed the trial court's award of sanctions under section 128.5 against the plaintiffs' counsel and in favor of one defendant, when that defendant's written request asked only for sanctions against the plaintiffs. (*Staples v. Hoefke, supra,* at p. 1418.) The court held that the absence of a written request for sanctions against the plaintiffs' counsel required reversal of the order imposing sanctions on counsel in that defendant's favor. (*Id.* at pp. 1418-1419.) In so holding, the court reasoned:

> "Sanctions may not be imposed on the motion of counsel 'except on notice contained in a party's moving or responding papers.' (Code Civ. Proc., § 128.5, subd. (c).) Just as the order imposing sanctions requires a writing in detail in order to fulfill due process, it must also be a requirement of due process that one against whom sanctions are sought is entitled to actual notice of his potential liability. (*Corralejo v. Quiroga* (1984) 152 Cal.App.3d 871, 873-874 ….) The absence of notice by defendant … to counsel for plaintiffs that sanctions were sought against counsel personally compels reversal of the order. (*Ibid.*)" (*Staples v. Hoefke, supra*, 189 Cal.App.3d at p. 1419; see also *Jansen Associates, Inc. v. Codercard, Inc.* (1990) 218 Cal.App.3d 1166, 1170 ["[T]he case law is clear that in order to impose sanctions against an attorney acting on behalf of a named party, the notice itself must clearly provide that sanctions are being sought against the attorney."].)

Here, respondents' notice of motion requested sanctions pursuant to section 128.5 on "the grounds that Mr. Blum's refusal to comply with the confidential recorded settlement" was frivolous, and the accompanying points and authorities requested only that "the Court consider appropriate sanctions." In their reply, respondents requested that the court "sanction Blum" by ordering that no legal fees be paid from the Klein trust in connection with "Blum's repudiation of the" settlement agreement, and "further order that Blum personally" reimburse them for the legal fees incurred in connection with enforcing the settlement agreement.

Thus, it is clear that respondents never made a written request that sanctions be imposed pursuant to section 128.5 against Blum's attorney, Gibson, Dunn & Crutcher LLP, personally. The first notice Gibson received that it could be personally liable for sanctions was when the trial court awarded sanctions against it in its oral ruling at the hearing. As the court found in *Staples*, respondents' absence of notice to Blum's counsel that sanctions were being sought against it personally compels reversal of that part of the order imposing sanctions against Gibson, Dunn & Crutcher LLP personally.

3. Sanctions Against Blum

Blum also appears to contend that he did not receive proper notice that sanctions were being sought against him, and that he was not given proper notice of the amount of sanctions sought. Recognizing that constitutional principles of due process require adequate notice prior to the imposition of sanctions (*Childs v. PaineWebber Incorporated*, *supra*, 29 Cal.App.4th at p. 995), we find that Blum was provided adequate notice that sanctions were being sought against him. Respondents' notice of motion requested sanctions pursuant to section 128.5 on "the grounds that Mr. Blum's refusal to comply with the confidential recorded settlement" was frivolous. Clearly, Blum's conduct was the basis of the sanctions request. Moreover, in case there was any doubt about who sanctions were being sought against, respondents stated in their reply brief that they requested the court "sanction Blum" by ordering no that no legal fees be paid from the

Klein trust, and "consider the sanctions against Blum proposed in the motion." Blum's due process rights were not violated in this respect.

Blum also contends, without citation to authority, that not being apprised of the amount of sanctions sought until respondents filed their reply papers deprived him of due process. We note that Blum has failed to make any reasoned argument to support his claim of error. "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785; see also *People v. Stanley* (1995) 10 Cal.4th 764, 793; *Akins v. State of California* (1998) 61 Cal.App.4th 1, 50 [waiver of contention by failure to cite any legal authority]; *Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [where point is merely asserted by appellant without argument or authority, it is deemed to be without foundation and requires no discussion by reviewing court].)

In light of Blum's failure to present any argument to support his claim of error regarding failure to be apprised of the amount of sanctions sought until respondents filed their reply brief, we summarily reject it. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [court not required to discuss or consider points which are not argued or not support by citation to authorities or the record].)

DISPOSITION

The order imposing sanctions on Gibson, Dunn & Crutcher LLP is reversed. In all other respects, the order is affirmed. Costs are awarded to respondents.

_____
Wieland, J.†

WE CONCUR:

_____
Ardaiz, P.J.

_____
Vartabedian, J.

†Judge of the Madera Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.